NO. 21754

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

EDISON R. NOGUEIRA, et al.,

Appellees

APPELLEES' REPLY BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

MILTON WICHNER

6922 Hollywood Boulevard
Suite 718
Hollywood, California 90028

Attorney for Appellees

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OPINION BELOW

Neither the court's written Memorandum (R. 52-53) nor the Findings of Fact and Conclusions of Law (R. 152-154) and Judgment (R. 157-158) have been reported.

JURISDICTION

For reasons which appear in the Argument, infra, Appellees maintain that there was no jurisdiction in the District Court to entertain this suit. The District Court agreed with the position and dismissed the action on November 16, 1966 (R. 157-158). Notice of Appeal was filed on January 9, 1967 (R. 160-161). The jurisdiction of this Court to review the ruling below rests on

28 U. S. C. §1291.

QUESTIONS PRESENTED

Whether the District Court correctly dismissed the suit for ejectment and damages against the Claimants of an unpatented placer mining claim located upon lands of the United States open to location, when the validity of the mining claim had not been contested in the administrative proceedings before the Department of Interior, and

Whether the dismissal can be supported as a proper exercise of discretion, even though the District Court had jurisdiction.

STATUTES INVOLVED:

Section 22 of 30 U. S. C.

"Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unserveyed, shall be free and open to exploration and purchase and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States. (R. S. §2319; Feb. 25, 1920,

ch. 85, § 1, 41 Stat. 437.)"

Section 26 of 30 U. S. C.

"The locators of all mining locations made on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim existed on the 10th day of May 1872 so long as they comply with the laws of the United States and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth.

Section 28 of 30 U. S. C.

"The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims made

after May 10, 1872, shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the 10th day of May 1872, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year. . . . and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location." [Emphasis added]

Section 35 of 30 U. S. C.

"Claims usually called "placers" including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the

public lands."

Section 611 of 30 U. S. C. (Act of July 23, 1955)

"No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: Provided, however, That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. "Common varieties' as used in sections 601, 603, and 611-615 of this title does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called "block pumice" which occurs in nature in pieces having one dimension of two inches or more. 'Petrified wood' as used in sections 601, 603, and 611-615 of this title means agatized, opalized, petrified, or silicified wood, or any material formed by the replacement of wood by silica or other matter. July 23, 1955, c. 375, § 3, 69 Stat. 368, amended Sept. 28, 1962, Pub. L. 87-713, § 1, 76 Stat. 652." [Emphasis in original]

Section 612(a) of 30 U. S. C. (Act of July 23, 1955)

"(a) Any mining claim hereafter located under the mining laws of the United States shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonable incident thereto."

Section 485 of 5 U. S. C. provides in part:
"The Secretary of the Interior is charged with the supervision of public business relating to the following subjects and agencies:

* * *

4. Bureau of Land Management.

* * *

13. Public lands, including mines."

Section 2 of 43 U. S. C. (Rev. Stat. 453) provides:
"The Secretary of the Interior or such officer as he may designate shall perform all executive duties appertaining to the surveying and sale of the public lands of the United States or in anywise respecting such public lands, and, also such as relate to claims of land, and the issuing of patents for all grants of land under the authority of the Government."

Section 1201 of 43 U.S.C. (Rev. Stat. 2478) provides: "The Secretary of the Interior, or such officer as he may designate, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title not otherwise specially provided for."

43 C.F.R. §§ 3400.1, 3400.2 and 3401.1 (formerly §§ 185.1 through 185.3:

"(a) Vacant public surveyed or unserveyed lands are open to prospecting, and upon discovery of mineral, to location and purchase. The act of June 4, 1897 (30 Stat. 36), provides that 'any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry,' notwithstanding the reservation. This makes mineral lands in the forest reserves in the public land states, subject to location and entry under the general mining laws in the usual manner. Lands entered or patented under the stockraising homestead law (title to minerals and the use of the surface necessary for mining purposes can be acquired), lands entered under other agricultural laws but not perfected, where prospecting can be done

peaceably are open to location."

§3400.2 "Whatever is recognized as a mineral by the standard authorities, whether metallic or other substance, when found in public lands in quantity and quality sufficient to render the lands valuable on account thereof, is treated as coming within the purview of the mining laws. Deposits of oil, gas, coal, potassium, sodium, phosphate, oil shale, native asphalt, solid and semisolid bitumen, and bituminous rock including oil-impregnated rock or sands from which oil is recoverable only by special treatment after the deposit is mined or quarried, the deposits of sulphur in Louisiana and New Mexico belonging to the United States can be acquired under the mineral leasing laws (see §3100.0-2), and are not subject to location and purchase under the United States mining laws. The so-called 'common variety' mineral materials and petrified wood on the public lands may be acquired under the Materials Act, as amended (see Part 3610)."

§3401.1 "Rights to mineral lands, owned by the United States, are initiated by prospecting for minerals thereon, and, upon the discovery of mineral, by locating the lands upon which such discovery has been made. A location is made by staking the corners of the claim, posting notice of location thereon and complying with the State laws, regarding the recording of the location

in the county recorder's office, discovery work, etc. As supplemental to the United States mining laws there are State statutes relative to location, manner of recording of mining claims, etc., in the State, which should also be observed in the location of mining claims. Information as to State laws can be obtained locally or from State officials."

43 C. F. R. §1852. 2-1 (Formerly 221. 67)
"The Government may initiate contests for any cause affecting the legality or validity of any entry or settlement or mining claim."

STATEMENT

Appellant appeals from the granting of Defendants' Motion for Summary Judgment of Dismissal.

The court found that Defendants were, since May 19, 1961, in possession of the Grapevine Placer Mining Claim which was located on May 1, 1961 (by relocation) and that MARIA A. F. NOGUEIRA was the owner thereof, subject to the paramount title of the United States of America; that no proceedings had been instituted in the Bureau of Land Management of the Department of Interior to contest the Grapevine Placer Mining Claim or to otherwise attack its validity; that when the mining claim was located it was part of the public domain, and open to mineral entry

(R-152). The court concluded that it had no jurisdiction to determine the right of Defendants to occupy the Grapevine Placer Mining Claim unless and until the validity of the mining claim had been finally determined by the Department of Interior after hearing duly held in accordance with the provisions of the Administrative Procedure Act (R. 153).

The United States of America had instituted the action for ejectment and damages by a complaint which alleged that the Defendants-Appellees were the successors in interest of the Grapevine Placer Mining Claim which was relocated on May 1, 1961 by Robert A. Mattey, their predecessor in interest (R. 3). The Complaint further alleges that the Grapevine Placer Mining Claim is invalid for lack of discovery of a valuable mineral. Defendants-Appellees' Answer set forth that the Grape Vine Placer Mining Claim was declared null and void for lack of discovery of a valuable mineral deposit by the Deputy Solicitor of the Department of Interior on February 29, 1960 at a time when the mining claim was owned by Mary A. Mattey; that the same superficial area was relocated on May 1, 1961 as the Grapevine Placer Mining Claim (R. 9). The Second Affirmative Defense and Counterclaim for Injunction alleges that there has been no contest or other proceeding taken by the United States of America to adjudicate the validity of the Grapevine Placer Mining Claim; that Appellees were entitled to an administrative hearing before they could be deprived of their rights to occupy their unpatented mining claim and that until such administrative adjudication of invalidity, they were entitled to protection against the threats and harrassments of the Secretary

of Agriculture, the Secretary of Interior and their officers, servants, agents and subalterns (R. 13-14). Appellant moved to strike Appellees' counterclaims (R. 20). Appellees thereupon made a motion for leave to amend their answer to include a Fourth Affirmative Defense and Counterclaim seeking judicial review of the final decision in U. S. A. v. Mary A. Mattey, 67 I. D. 63, declaring the Grape Vine Placer Claim null and void on the ground that the decision nullifying the mining claim was subject to judicial review under the Administrative Procedure Act (R. 24).

Both sides presented points and authorities, and arguments in support of their respective positions which gave rise to the court's following written Memorandum (R. 52):

> "The matter under submission is the motion of the plaintiff United States of America to strike Defendants' counterclaim and plaintiff's objection to proposed amendment to defendants' counterclaim.
>
> "From an examination of the face of the Complaint it appears that the matter is not yet ripe for any action by this Court, either that sought by the plaintiff or that sought by the defendants.
>
> "The Complaint alleges that a mining claim was located on the property involved on May 1, 1961. There is no allegation that the invalidity of that mining claim has ever been heard or determined by the Bureau of Land Management of the Department of the

Interior. That this is a preliminary prerequisite to jurisdiction by any court on the validity of a mining claim was settled in Best, et al., v. Humboldt Placer Mining Co., et al. 1963, 371 U.S. 334. The appropriate proceeding would appear to be a motion by the defendants for summary judgment of dismissal, either supported by affidavits or other affirmative data showing the act of locating the mine, the date, the fact that the property has not been withdrawn from mineral entry, and the fact that no hearing has ever been called or held in the Department of Interior to determine the validity of said claim, and such other affirmative facts as defendants may deem appropriate.

"These facts are gleaned from the record by virtue of copies of correspondence from the Interior Department, but in view of the provisions of F. R. C. P. 56(e) it would be more appropriate if such affidavits were filed."

On May 4, 1966, Appellees moved the court to enter a summary judgment dismissing the complaint in ejectment on the ground that the court had no jurisdiction of such an action based upon occupancy or possession of an unpatented mining claim, the validity of which had not been yet determined by the Bureau of Land Management of the Department of Interior, relying on the Best et al., v. Humboldt Placer Mining Co., 371 U.S. 334 and

Cameron v. U. S. A., 252 U. S. 450 (R. 56-58). The affidavit presented in support of the motion for summary judgment showed that the local officials of the Land Office and the Forest Service took the position that since the Grape Vine Placer Mining Claim had been declared null and void the subsequently relocated Grapevine Placer Mining Claim was also null and void and that occupancy of the unpatented mining claim by Appellees constituted a trespass (R. 62). Appellees advised the Land Office and the Forest Service that if they desired to have the validity of the Grapevine Placer Mining Claim adjudicated, the Department of Agriculture should request the Department of Interior to institute appropriate contest proceedings rather than to attempt the eviction of Appellees from the mine by unfounded charges of trespass (R. 63).

Selective extraction of excerpts from the depositions, gives the erroneous impression that the Appellees were occupying the Grapevine Placer Mining Claim exclusively for residential purposes and not for any purpose connected with the prospecting for and developing of the mineral deposits located on the said mining claim. When read as a whole, the depositions of Robert A. Mattey, and of Miss and Mr. Nogueira, after giving due weight to the language barrier, indicates the following facts:

The original Grape Vine Placer Mining Claim was located by the father of Robert A. Mattey and was inherited by his mother, Mary A. Mattey. Mrs. Mattey filed an application for patent which was protested by the Forest Service. Hearings were held on

the protest before a Hearing Examiner who dismissed the protest. (See Appendix I). The Decision of the Hearing Examiner was affirmed by the Director of the Bureau of Land Management (See Appendix II), but reversed by the Deputy Solicitor of the Department of Interior (R. 88-93).

Robert A. Mattey relocated the mining claim on May 1, 1961 under 30 U.S.C. 28 by filing Notices of Location and doing the necessary discovery work on fire clay (R. Dep. 14). On the same day, Mary Mattey quitclaimed to Robert Mattey all her right, title and interest in the old Grape Vine Placer Mining Claim which had been declared null and void by the Deputy Solicitor of the Department of Interior on the ground that the sedimentary shale upon which the application for mineral patent had been based, was a "common variety" of material which was not subject to mineral location.

Shortly thereafter vandals were doing extensive damage to the buildings, the well, and the tanks and Mattey sought a caretaker to dwell on the premises (R. Dep. 7, 21 and 39). Appellees contacted Mr. Mattey who told them about the problems with the validity of the mining claim. Appellees agreed to lease the claim with option to buy (R. Dep. 9). Thousands of tons of clay had been mined from this property and it was a going mine until the edict of the Secretary of Interior that the mineral was "common clay" (R. Dep. 13). After the relocation of May 1, 1961, some material was removed for test purposes (R. Dep. 15).

The mine was not operated because of the obstacles put up

by the Forest Service. As Mr. Mattey succinctly stated, "How can you operate a mine at all if your own Government tells you, you can't do it and to get off the premises? He [Nogueira] is fighting for the privilege of developing his claim" (R. Dep. 49).

Appellees moved upon the mining claim, repaired the premises, made efforts to exploit the fire clay on the mining claim. Some of the companies who sampled the clay and with whom Appellees negotiated were American Cement Corp. (E. Dep. 8), Riverside Cement Co. (E. Dep. 9), Gladding McBean and Pacific Clay Corp. (E. Dep. 9 to 11). Almost each week some prospecting efforts were made (E. Dep. 12). Mr. Nogueira had spent many years developing limestone deposits in Brazil for cement purposes (E. Dep. 15) and working with engineers and laboratories while he was in the Brazilian diplomatic service (E. Dep. 38).

Mr. Nogueira started negotiations in March of 1962 with Mr. Nichols of the Ceramics Division of International Pipe and Ceramics Corp. (R. 122-123). Mr. Nichols was instructed in September of 1962 to tell Mr. Nogueira to stop bothering the people at the Corona facilities, as his claim was so hopelessly entangled that Interpace did not wish to proceed any further (R. 123). ('Interpace' is the successor to Gladding-McBean).

The decision of the Hearing Examiner in the California Contest No. 6796 entitled "United States of America v. Mary A. Mattey: contains the following language regarding fire clay:

> " . . . The minerals referred to as having been found on the claim were sedimentary clay or

shale, and residual clay or fire clay.

"The contestee witnesses stated that while the shale was the primary material found on the claim, residual clay had been found several months before the hearing. The limited testimony regarding this latter substance was insufficient to base a conclusion that there had been a discovery of residual clay in the quality and quantity necessary to satisfy the mining laws. Therefore, no further consideration was given to this material."

See copy of the Decision set forth in the Appendix to this Brief.

In his 1961 location, Mr. Mattey was merely attempting to develop the fire clay which he already knew existed and Appellees carried on the efforts to develop the discovery of fire clay (R. Dep. 46 through 49).

The correspondence with the Manager of the Land Office (R. 62-63) and the deposition of Mr. Nogueira demonstrates that he did all the prospecting and exploitation of his mining claim that the Department of Agriculture and Department of Interior would permit him to do in the face of their strenuous opposition.

ARGUMENT

I

UNTIL A PATENT HAS BEEN ISSUED, THE DEPARTMENT OF INTERIOR HAS THE EXCLUSIVE JURISDICTION TO DETERMINE THE VALIDITY OF AN UNPATENTED PLACER MINING CLAIM.

This question was settled by Best v. Humboldt Placer Mining Co. et al., 371 U. S. 334; 9 L. Ed. 2d 350, 83 S. Ct. 379,[1/] where the United States sued in the District Court to condemn real property whereon the defendants had unpatented mining claims. The complaint asked that the United States be allowed to reserve authority to have the validity of the mining claims determined in administrative proceedings before the Bureau of Land Management of the Department of the Interior. Thereafter, the United States instituted a contest proceeding in the local Land Office of the Bureau of Land Management, seeking administrative determination of the validity of Defendants' mining claims, alleging that the land was nonmineral in character and minerals had not been found within the limits of the claims in sufficient quantities to constitute a valid discovery. Defendants instituted an action against the State Supervisor of Bureau of Land Management and the Manager of the District Land Office to enjoin them from proceeding with the administrative contest action. The District Court granted a summary judgment of dismissal of the action for injunction. 185 F. Supp.

1/ Because of the frequency of reference, the citation will be hereafter omitted.

29. The Court of Appeals reversed (293 F. 2d 553).

Mr. Justice Douglas enunciated the principles applicable to mining claims and the jurisdiction and power of the Secretary of the Interior with respect thereto, stating that: " . . . the Court of Appeals wrote nothing in derogation of these principles in Best v. Humboldt. This expostulation of the principles and authorities supporting them, follows very closely the argument in the brief of the Government in Best v. Humboldt, contending that Congress has given to the Department of Interior primary authority for the administration and disposition of public lands, including mining claims on such lands. Thus, the same quotations from Cameron v. United States, 252 U.S. 450 at 459-462; 40 S. Ct. 410; 64 L. Ed. 659 are found in the opinion. The following excerpts from the Government's brief in Best v. Humboldt, are apposite:

> "The Court has thus held that the Department of the Interior has exclusive jurisdiction to determine rights in the public lands so long as no patent has been issued and legal title remains in the United States. See also, Northern Pacific Ry. Co. v. McComas, 250 U.S. 387, 392; Brown v. Hitchcock, 173 U.S. 473, 477. According to these cases, the courts are not to touch the issue of title as between the United States and a private claimant or between private claimants until proceedings before the Department of the Interior have been brought and finally determined. In Brown v.

Hitchcock, supra, a private claimant sued in the federal court for cancellation of an order of the Secretary of the Interior which declared certain lands claimed by the plaintiff from the State of Oregon to be part of the public domain. The Court sustained a demurrer to the complaint and held that, as no patent had been issued, legal title had not passed and that ' so long as the legal title remains in the Government all questions of right should be solved by appeal to the land department and not to the courts' (id. at 477). [Emphasis added]

"The Court had taken the same position in holding that the courts are without jurisdiction to enjoin or mandamus an officer of the Land Department in order to control his exercise of judgment and discretion in determining the validity of claim to public lands (Riverside Oil Co. v. Hitchcock, supra, at 324):

> 'Congress has constituted the Land Department, under the supervision and control of the Secretary of the Interior, a special tribunal with judicial functions, to which is confided the execution of the laws which regulate the purchase, selling and care and disposition of the public lands.'

"Where a patent has been issued, the Court has held that it is to be given conclusive effect by the courts

in a subsequent title dispute (Steel v. Smelting Co., 106 U.S. 447, 451):

> 'In Johnson v. Towsley, the effect of the action of that department was the subject of special consideration. And the court applied the general doctrine, "that when the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others," and said, speaking by Mr. Justice Miller, "that the action of the land-office in issuing a patent for any of the public land, subject to sale by pre-emption or otherwise, is conclusive of the legal title, must be admitted under the principle above stated, and in all courts, and in all forms of judicial proceedings, where this title must control, either by reason of the limited powers of the court, or the essential character of the proceeding, no inquiry can be permitted into the circumstances under which it was obtained." 13 Wall. 72, 83.'

"The statutes, regulations issued pursuant thereto, and the judicial precedents announced by this Court over more than a century leave no doubt, then, that the only tribunal which was open to respondents to establish their rights

against the United States was the Department of the Interior.[8] The cases establish the further proposition that until legal title has passed -- with the issuance of a patent -- the validity of any claim is to be determined by the Department of the Interior in exercise of its primary jurisdiction. In holding that, although no patents for the lands had been issued, the filing of the condemnation action transferred exclusive primary jurisdiction to the district court to determine the validity of the claims, we believe the Court of Appeals was disregarding the statutes and the historic teaching of this Court's long settled decisions."
[Emphasis added]

---

8 There are cases where in a suit to quiet title by the United States or to eject trespassers from public lands, the courts have, as part of the general issue, determined whether there has been a valid mineral discovery. Kennedy v. United States, 119 F. 2d 564 (C. A. 9); United States v. Mobley, 45 F. Supp. 407 (S. D. Cal.); United States v. Schultz, 31 F. 2d 764 (N. D. Cal.). We have found no case where such a determination has been made by a court at the request of a claimant and over the objection of the United States.

We adopt these arguments and citations. The applicability of Best v. Humboldt to the case at bench, seems crystal clear, when Justice Douglas states:

"If a patent has not issued, controversy over the claim should be solved by appeal to the Land Department and not to the Court. Brown v. Hitchcock,

173 U.S. 473, 447; 43 L. Ed. 772, 774 and 19 S. Ct. 485, and Northern P. R. Co. v. McComas, 250 U. S. 387, 392; 60 L. Ed. 1053 and 39 S. Ct. 546."

The District Judge in the case at bench dismissed the action for ejectment and damages since the complaint revealed that appellees were occupants of the unpatented Grapevine Placer Mining Claim. The affidavits, the pleadings and the Motion for Summary Judgment as well as antecedent motions, clearly showed that the basic issue involved in the ejectment and trespass action was the validity of the Grapevine Placer Mining Claim which was relocated by Appellees' predecessor in title on May 1, 1961. The complaint expressly alleges that the mining claim is invalid for "lack of discovery of a valuable mineral"; one of the same grounds of invalidity as was involved in Best v. Humboldt.

The Findings of Fact of the District Judge are fully supported. The conclusions of law and Judgment of Dismissal follow naturally from Best v. Humboldt.

However, it is not necessary to support the dismissal on the basis of jurisdiction alone.

II

THE DISTRICT COURT HAD DISCRETION TO ALLOW THE ISSUE OF VALIDITY OF THE MINING CLAIM TO BE RESOLVED BY THE ADMINISTRATIVE AGENCY WITH SPECIAL EXPERIENCE AND EXPERTISE IN THESE MATTERS.

The judgment of dismissal which was not on the merits by the District Court was merely an act of "holding its hand until the issue of validity of the claim has been resolved by the agency entrusted by Congress with the task."

Best v. Humboldt, at page 340.

Although the District Judge felt it was a matter of jurisdiction based upon the holding in Best v. Humboldt, his dismissal can be supported on the basis of proper exercise of discretion.

It is, of course, settled practice for the federal courts to stay the exercise of their jurisdiction in appropriate circumstances to enable either a state court (See Railroad Commission of Texas v. Pullman Co., 312 U.S. 496; Burford v. Sun Oil Co., 319 U.S. 315; Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25; Leiter Minerals, Inc. v. United States, 352 U.S. 220, or an administrative tribunal (See e.g. Texas & Pacific Ry. v. American Tie Co.,234 U.S. 138; United States v. Western Pacific R. Co., 352 U.S. 59; Pennsylvania Ry. Co. v. United States 363 U.S. 202; Civil Aeronautics Board v. Modern Air Transport, Inc., 179 F. 2d 622, 625 (C.A. 2); United States v. Railway Express Agency Inc., 89 F. Supp. 981 (D. Del.). See also Jaffe, Primary Jurisdic-

tion Reconsidered, 102 U. Pa. L. Rev. 577, 584-592) to adjudicate issues peculiarly within its competence. This Court has pointed out that (Far East Conference v. United States, 342 U. S. 570, 574-575):

> " * * * in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judically defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure."

The Department of the Interior is the expert agency established by Congress for adjudication of mining claims on the public lands. The intricacy of the factual determinations on which validity depends calls for the expertise which the agency possesses and which the courts would be hard put to duplicate. The number

andcomplexity of the validity proceedings which arise in connection with mining claims and are heard by the examiners in the Bureau of Land Mangement would seriously increase the already overcrowded dockets of the federal courts. In the circumstances, deference to the agency's authority to determine the validity of mining claims will not only promote the interest of sound and orderly judicial administration, but will also serve the purposes for which Congress created the agency and invested it with authority over such claims -- the encouragement of prospecting for minerals, conservation of resources and maintenance of the integrity of public lands -- by promoting a uniform and expert administration of the statues and regulations.

The same reasons were urged by the Government in their Petition for Writ of Certiorari and in their briefs in the Supreme Court, for the reversal of the 9th Circuit Decision in Best v. Humboldt. Footnote 8, 371 U.S. 334, 339 recites the number of departmental cases being processed through the Department of Interior in the fiscal year 1960-1961. The Government warned that dire consequences would result from the Circuit Court decision because the District Courts would inherit this massive volume of litigation. The Government also warned that mining titles would become unsettled because of the District Court's dismissals by the District Courts in the 9th Circuit of a number of condemnation cases in reliance on administrative decisions which might not be res judicata; and that the District Court judges lacked the experience and expertise that resolution of issues of title relating to mining

claims required.

The Government argued that reasons of sound judicial and land management administration dictated the conclusion that the District Court had discretion to permit the validity of the mining claim to be determined in administrative proceedings before the Bureau of Land Management. The Government is now espousing the opposite point of view in the case at bench. This is not a case where "turn about is fair play".

Some of the problems of Best v. Humboldt arose from the fact that a condemnation case was involved, bringing into play Rule 71 of the Federal Rules of Civil Procedure. However, the basic principles and problems of judicial and administrative policy require that trespass actions be treated in the same manner as condemnation cases. In both situations, the issue of validity of unpatented mining claims are involved.

The interpretation which the Government argues in the case at bench, would have an effect of unsettling mining titles, which has been abhorred since the passage of the Mining Law of 1866. Miners, in 1858 were held to be trespassers on the public domain by the Federal District Court in United States v. Parrott. The Western Bloc in Congress sought legislation confirming existing mining titles which had been acquired through Congressional acquiescence and also the right to free mining on the public domain. The Mining Law of 1866 which was finally merged into The Mineral Location Act of 1872, (30 U S. C. 21 et seq.), represented a victory of the Western Bloc in their efforts to settle mining

titles. See generally The American Law of Mining, 1960, Vol. I, Chapters 1 and 2.

The only method of preserving the stability of mining titles is to decide on a uniform method of adjudication of their validity. Either the Department of Interior should have the exclusive right or the Courts. Neither mining claimants nor the Government should have the right to select the most favorable forum to suit any particular position.

Best v. Humboldt established that the Agency was the forum for adjudication of the issue of validity of mining claims. The Government in the case at bench demands the right to elect its forum while foreclosing the mining claimant from any right of election. Such preferential imbalance has no support in either theory, authority or policy.

Justice Douglas in Best v. Humboldt designates a mining claim as a unique form or property.

In Wilbur v. Krushnic, 280 U.S. 306, 316, 317 the court states:

> "The rule is established by innumerable decisions of this Court, and of state and lower federal courts, that when the location of a mining claim is perfected under the law, it has the effect of a grant by the United States of the right of present and exclusive posession. The claim is property in the fullest sense of that term; and may be sold, transferred, mortgaged and inherited without infringing any right or title of the United

States. The right of the owner is taxable by the state; and is 'real property' subject to the lien of a judgment recovered against the owner in a state or territorial court. . . . The owner is not required to purchase the claim or secure patent from the United States; but so long as he complies with the provisions of the mining laws, his possessory right, for all practical purposes of ownership, is as good as though secured by patent."

Cited with approval in Boesche v. Udall, 373 U.S. 472, 10 L. Ed. 2d 491, 83 S. Ct. 1373.

Union Oil of California v. Smith, 249 U.S. 3, 39 S. Ct. 30, 63 L. Ed. 336, elaborated on the possessory rights of a locator before he makes a discovery. In the case at bench, the contention is that there has been a failure to make a discovery and therefore the Nogueiras are merely trespassers without any rights. Union Oil of California v. Smith, explains it as follows:

"* * * in order to create valid rights or initiate a title as against the United States a discovery of minerals is essential. * * * [The Mining Law] extends an express invitation to all qualified persons to explore the lands of the United States for valuable mineral deposits and * * * hold out to one who succeeds in making discovery the promise of a full reward. Those who, being qualified, proceed in good faith to make such explorations and enter peaceably upon vacant lands of the United

States for that purpose, are not treated as mere trespassers, but as licensees or tenants at will. For since, as a practical matter, exploration must precede the discovery of minerals, and some occupation of the land ordinarily is necessary for adequate and systematic exploration, legal recognition of the pedis possessio of a bona fide and qualified prospector is universally regarded as a necessity. It is held that upon the public domain a miner may hold the place in which he may be working against all others having no better right, and while he remains in possession, diligently working towards discovery, is entitled -- at least for a reasonable time -- to be protected against forcible, fraudulent, and clandestine intrusions upon his possession."
[Citations omitted]

"And it has come to be generally recognized that while discovery is the indispensable fact and the marking and recording of the claim dependent upon it, yet the order of time in which these acts occur is not essential to the acquisition from the United States of the exclusive right of possession of the discovered minerals or the obtaining of a patent therefor, but that discovery may follow after location and give validity to the claim as of the time of discovery, provided no rights of third parties have intervened.

"In the California courts the right of a locator before discovery, while in possession of his claim and prosecuting exploration work, is recognized as a substantial interest, extending not only as far as the pedis possessio, but to the limits of the claim as located; so that if a duly qualified person peaceably and in good faith enters upon vacant lands of the United States prior to discovery but for the purpose of discovering oil or other valuable mineral deposits, there being no valid mineral location upon it, such person has the right to maintain possession as against violent, fraudulent, and surreptitious intrusions so long as he continues to occupy the land to the exclusion of others, and diligently and in good faith prosecutes the work of endeavoring to discover minerals thereon. Whatever the nature and extent of a possessory right before discovery, all authorities agree that such possession may be maintained only by continued actual occupancy by a qualified locator or his representatives engaged in persistent and diligent prosecution of work looking to the discovery of mineral." [Citations omitted]

Mr. Justice Pitney then pointed out that after discovery, actual and continuous occupation of a mining claim is not essential to preservation of property rights which can then be lost only through abandonment.

Appellants' authorities lend no support to its contention that the District Court has jurisdiction or discretionary authority to adjudicate the validity of a mining claim over the objection of the mining claimant after Best v. Humboldt.

On page 21 of this brief, we showed the circumstances under which Kennedy v. United States, 119 F. 2d 564 and U. S. v. Schultz, 31 F. 2d 764 were cited, in the Supreme Court Brief in Best v. Humboldt. They were cited as exceptions to the general rule promolgated by statutes, regulations and judicial precedents that the only tribunal open to a mining claimant to establish rights in mining claims against the United States of America, is in the Department of Interior, and that there existed no case making a determination of validity by a court at the request of a mining claimant over the objection of the United States of America. We deem this to be at variance with the argument on page 14 in the Appellant's brief in the case at bench.

Kennedy v. United States, 119 F. 2d 564, holds just what the Government argues in the Supreme Court in Best v. Humboldt: that in a suit to quiet title by the United States, or to eject trespassers from public lands, the court would, as part of the general issue, determine whether there has been a valid mineral discovery.

Kennedy v. United States is distinguishable on the facts. The Kennedy case involved a stock raising homestead entry rather than a mining claim. The act providing for stock raising homesteads requires no formalities except residence for the prescribed period. The Land Laws (43 U. S. C. 231, 232) provide for excuse

from occupancy for a period not exceeding 5 months in aggregate in each year upon filing a notice in the local Land Office at the beginning of such period of absence. Except for such situation, the first time that any formal action is required, is at the expiration of the period of occupancy, when an application may be filed in the Land Office. Kennedy did not fulfil any of the requirements of residence. The District Court restrained Kennedy from occupying and grazing live stock on the land. The Ninth Circuit affirmed.

Rights under the homestead laws differ radically from rights under the mining laws. Kennedy was a trespasser: no interpretation of the facts could show that Kennedy had resided on the land for sufficient period to qualify him as a homestead patent applicant. In the case at bench, Appellees had acquired either post-discovery possessory rights, or 'pedis possessio' rights based upon occupancy and completion of the formal steps of location of the Grapevine Placer Mining Claim on May 1, 1961, giving them a status under the Statutes and the law that we have previously described.

Kennedy v. United States therefore has no application to the question of jurisdiction of the District Courts in mining cases.

U.S. v. Schultz, 31 F. 2d 764, which Kennedy relies on, has not survived Best v. Humboldt, and is no longer the law. United States v. Toole, 224 F. Supp. 440, is not persuasive, since the question of jurisdiction was apparently not raised.

The Government stresses the cumbersome and burdensome process of achieving final adjudication of title in administrative

proceedings. The mining claimants in Best v. Humboldt expressed a preference for court adjudication rather than administrative adjudication on the same basis, and on the additional basis that standards of validity applied by the court were less restrictive than those applied by the administrative agency. Justice Douglas disposed of the latter point by saying if such were the case, these contentions could be raised in the administrative proceedings and reserved for judicial review. We can see no more justification in our case than in Best v. Humboldt to make a determination of jurisdiction and discretion based upon deficiencies in the administrative system of adjudication. More efficient and expeditious methods of handling public lands litigation is the concern of the Executive or Legislative branches of our Government, and not the courts.

The Government's contention that Judge Hall's decision and the necessity for determination by the agency with its incidental delays, would enable persons to continue in possession of void claims for long periods of time by use of the stategy of "relocation", is without merit.

The court in any case has no power to interfere with the right given by the Mining Laws to explore the public domain, even though a mining claim has been adjudicated to be null and void for lack of discovery.

Adams v. United States, 381 F. 2d 861.

In this case, Adams' claims were declared void for want of discovery. The District Court judicially reviewed the admini-

strative proceedings and Adams was enjoined from:

> "(4) . . . doing any acts or things on these lands relating to or claimed to be related to any asserted mining claims or locations or any claim or assertion that the lands are mineral in character."

The Circuit Court affirmed the judgment of the District Court after modifying its judgment to eliminate the quoted portions of the decree which interfered with Adams' rights to continue his efforts to prospect for minerals upon the claims which had been declared invalid. It is a basic tenet of the Mining Laws that all valuable mineral deposits on lands belonging to the United States are "free and open to exploration and purchase, and the lands in which they are found, to occupation and purchase * * *" 30 U.S.C. 22.

III

THE MERE FACT THAT A PREVIOUSLY LOCATED CLAIM WAS DECLARED TO BE INVALID IN AN UNREVIEWED ADMINISTRATIVE DECISION [UNITED STATES v. MATTEY, 67 I.D. 63] DID NOT PREVENT THE CLAIM FROM THEREAFTER BEING RELOCATED, OCCUPIED AND PROSPECTED

The location of the Grapevine Placer Mining Claim on May 1, 1961 was a bona-fide relocation made for proper purposes.

The Government's Argument B raises the question of good faith. Other sections of the brief suggest fraud, misuse of the mining laws, waste or maliciousness. Nothing in the pleadings suggests any such issue. The complaint merely seeks to eject the

Appellees on the basis of a placer mining claim imperfected because of lack of discovery. Coleman v. United States, 363 F. 2d 190 (9th Cir. 1966), (Certiorari has recently been granted) held that if the good faith of a mining claimant in locating the ground for the asserted purpose of exploiting the minerals therein, is an issue, the mining claimant should be put on notice of the issue in a complaint filed by the administrative agency. The same reasons for requiring the administrative complaint to state when any contention of bad faith is involved should apply with equal force to the District Court complaint. No such issue was raised by the pleadings in the case at bench. The Findings of Fact of the District Judge and the depositions and affidavits show that the claim was relocated for mining purposes by Robert A. Mattey, the predecessor in title of Appellees. The Hearing Officer's decision shows that the presence of fire clay was known to be present during the pendency of the agency proceedings, but that there was insufficient evidence of quantity. The Hearing Officer therefore rendered his decision on the basis of the shale which was then being used in the production sewer pipe. (See Appendix I to this Brief) Mr. Mattey's deposition shows that he filed his relocation on May 1, 1961, on the basis of the "fire clay" [which is a material of higher grade and less common variety than shale]. He made his location to attempt to develop a 'discovery' of fire clay to validate his location, and under these circumstances he leased the premises to Appellees with option to buy. Appellee Nogueira felt that there was an adequate supply of the fire clay and devoted his efforts to develop a

market therefor. If we assume that the marketability requirement for discovery expounded in Coleman v. United States, loc. cit. supra, was applicable to fire clay, then Appellees' efforts to interest the various clay companies in purchasing the material, was an effort to establish marketability and thus establish evidence of discovery. It would be strange if, under such circumstances, the court would be permitted to interfere in any way with the efforts of Appellees to establish marketability and perfect their location.

The record is replete with indications that the Noguerias were impeded in every step by the Forest Service and the Bureau of Land Management in their efforts to develop their fire clay and establish marketability.

There certainly were none of the abuses of the mining laws set forth in pages 18 through 20 of the Appellant's Brief. We concede that using a mining claim for the sole purpose of a fishing camp, a residence, a summer camp, a hunting lodge, or a saloon, or the like, does not fulfil the policy of the Mining Laws to promote the development of mineral deposits.

The facts in the case at bench, do not, as contended by the Government, show use exclusively for residential purposes, nor have Appellees admitted using the premises illegally or for purposes wholly unrelated to the mining development.

The Government's brief has pointed out that no issue is raised in this appeal of the right to Appellees to judicial review of the decision in 67 I. D. 63, decreeing that the original Grape Vine

Placer Mining Claim is invalid or by the counterclaim based upon the Mining Claims Occupancy Act (76 Stat. 1127, Act of October 23, 1962) alternatively contending Appellees to be residential occupants of the mining claim declared to be invalid in 67 I. D. 63. These counterclaims are therefore outside the scope of this appeal.

IV

APPELLEES OCCUPANCY WAS PROPER AND IS NOT SUBJECT TO INTERFERENCE.

Section 30 U S. C. 612 permits mining claims to be used for several distinct purposes:

1. Prospecting
2. Mining
3. Processing
4. Uses reasonably incident thereto.

We have shown that the Placer Mining Claimant has the right of "pedis possessio" prior to the completion of his discovery which requires him to remain in continuous occupancy in order to protect his location .

The process of searching for valuable minerals is defined as "prospecting" and is different from "Mining". "Mining" is the process of extracting valuable minerals from the ground. "Processing" operations are the procedures of treating the minerals ores in various ways, such as screening, grinding, pulverizing, mixing, concentrating, smelting or otherwise removing the

valuable minerals from the waste materials.

Physical presence on the property is reasonably necessary and incidental to carry on any of the three operations of prospecting, mining or processing. It should be noted that the structures on the mining claims were being destroyed by vandals and Mr. Mattey originally sought some one to occupy the structures, to repair them and prevent further vandalism. Appellees entered into occupancy with the purpose of trying to exploit the mineral resources of the mining claim and they proceeded to make efforts to market the fire clay. Either they made a discovery or they did not. If they did not make a discovery, their occupancy would be necessary to protect their "pedis possessio". If they had established a discovery, they were entitled to occupy the structures as being incidental to the protection of the claim, and to the conduct of development of mining and processing operations.

There is no requirement in law or reason for compelling mining claimants to use a bed roll, tent or lean-to (conventional prospector's gear) rather than a more substantial structure that was already available on the claim. [This dwelling has recently been completely destroyed by fire, compelling the Appellees to occupy a warehouse area.]

Whether the occupancy was incidental to the prospecting, mining and processing operation, or wholly divorced and isolated therefrom, was a question of fact which Judge Hall resolved in favor of Appellees. The Findings of Fact, although they may have been determined on conflicting evidence, are not subject to attack

in this appeal.

We, of course, contend that each of the Facts are supported by uncontroverted evidence. The Findings of Fact, when fairly interpreted, imply that the possession and occupancy of the Grapevine Placer Mining Claim which was located on May 1, 1961, was incidental to its use for mining purposes, and the evidence supports such implication.

Appellees' occupancy of the Grapevine Placer Mining Claim was properly within the purposes of 30 U. S. C. 612.

CONCLUSION

The judgment of dismissal of the Government's trespass action as premature should be affirmed since the Grapevine Placer Mining Claim has not yet been contested administratively as required under the principles enunciated in Best v. Humboldt Placer Mining Co., 371 U. S. 334.

Respectfully submitted,

MILTON WICHNER

Attorney for Appellees

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Milton Wichner
MILTON WICHNER

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Office of the Hearing Examiner
P. O. Box 3861
Portland 8, Oregon

May 7, 1957

CERTIFIED, RETURN RECEIPT REQUESTED

D E C I S I O N

United States of America,	:	
Contestant	:	California Contest #6796
	:	Involving the Grape Vine Placer Claim
v.	:	Situated in Lot 9, Section 4, Township
	:	4 South, Range 7 West, San Bernardino
Mary A. Mattey,	:	Meridian, California
Contestee	:	

Patent Protest Dismissed

The Acting Regional Forester, Region 5, United States Forest Service, San Francisco, California protested a patent application for the Grape Vine Placer Mining Claim by charging and alleging as follows:

1. No discovery of mineral has been made.

2. The land is non-mineral in character.

Notice of the charges was properly served on the contestee and a timely answer was filed in which the charges were denied. A hearing was held in Los Angeles, California pursuant to the Department of the Interior Rules of Practice (43 CFR Part 221) on January 29, 1957 to determine the truth of the charges. At the hearing an appearance on behalf of the contestant was made by Charles F. Lawrence, Attorney, Office of the General Counsel, United States Department of Agriculture, 216 Federal Building, Civic Center, San Francisco 2, California. An appearance on behalf of the contestee was made by Alfred D. Freis, Attorney at Law, 620 Story Building, 610 South Broadway, Los Angeles 14, California.

II

The witnesses who testified on behalf of the contestant were Joseph K. Munhall, and William L. Johnson. Mr. Munhall was the District Ranger, Trabuca District, Cleveland National Forest. William L. Johnson, an employee of the United States Forest Service, was qualified as a Mining Engineer. The witnesses who testified on behalf of the contestee were Clifford Tillotson and Bruner M. Burchfield. Mr. Tillotson was qualified as a manufacturer of ceramic sewer tile. Mr. Burchfield

was qualified as an expert in the field of ceramic materials. The minerals referred to as having been found on the claim were sedimentary clay or shale, and residual clay or fire clay.

The contestee witnesses stated that while the shale was the primary material found on the claim, residual clay had been found several months before the hearing. The limited testimony regarding this latter substance was insufficient to base a conclusion that there had been a discovery of residual clay in the quality and quantity necessary to satisfy the mining laws. Therefore, no further consideration was given to this material.

III

There appeared to be no dispute between the parties regarding the nature of the shale deposits, the uses of the material, or the amount of available shale in the area. Shale, ball clay, and residual clay at a ratio of approximately 65%, 15% and 20%, respectively, are blended to form the mix for vitrified sewer pipe. Ball clay is used as the bonding agent, residual clay is used as the reinforcing agent, and the shale, containing flux materials, is used as the bulk substance. The flux materials in the shale is the agent causing vitrification at economic temperature levels. While ordinary dirt could be used for the sewer pipe, the ratio of residual clay would have to be increased to 60%, flux materials would have to be added, and higher temperatures would have to be used. A contestee witness testified that the quantity of residual clays in the area was limited so that it was advantageous to use shale in order to reduce the amount of residual clays. Also, a contestee witness testified that common brick has greater porosity than sewer pipe so that any material which responds to incipient fusion by heat could be used for brick including ordinary dirt. The available shale deposit in this area in private ownership is limited, but there are vast deposits on government lands at less accessible locations. Also, there was evidence at the hearing that the claim was accessible and that there was a market for the shale material. From the testimony and evidence presented at the hearing I conclude that the shale deposits on the Grape Vine Placer Claim meet the test of marketability as defined herein.

The contestant contended (1) that the clay of the kind found on the Grape Vine Claim has never been subject to appropriation under the mining laws, and (2) that no valid discovery was made prior to July 23, 1955, and that since this date the discovery of the type of clay in question is not permissible. Therefore, the questions to be determined are whether the sedimentary clay or shale found on the claim was ever subject to appropriation under mining laws, and whether the effective date of the location was prior to July 23, 1955.

IV

The mining laws of the United States (30 U.S.C. Secs. 21 and 22) provide that only "valuable mineral deposits" may be located and that the lands involved must be "valuable for mineral". These laws have been construed to mean that if a deposit in land does not render its extraction profitable

d justify expenditures to that end, it is not a mineral deposit. istman v. Miller, 197 U.S. 213, 322 (1905), Cameron v. United States, U.S. 450, 459 (1920).

In applying this rule to deposits similar to the deposits in sue, the Department had held that a showing must be made, that the eosits can be removed and marketed to a profit. Opinion of Acting olcitor, 54 I.D. 294 (1933); Layman v. Ellis, 52 I.D. 714 (1929). is rule was summarized by the Department in United States v. Strauss, al, 59 I.D. 129 (1945) at Page 138, as follows:

> "Gypsum, clay, limestone, and other kinds of stone here involved have been held to be minerals. W. H. Hooper, 1 L.D. 560 (1881); Alldritt v. Northern Pac. R. R. Co., 25 L.D. 349 (1897); United States v. Barngrover et al., 57 I.D. 533 (1942). But whether particular deposits of these and other mineral substances of wide occurrence are valuable mineral deposits within the contemplation of the Mining Laws and whether the lands containing them are therefore subject to location and purchase under the Mining Laws are questions of fact, held to depend upon the marketability of the deposit. The rule long laid down by both the courts and the Department requires that to justify his possession the mineral locator or applicant must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed, and disposed of at a profit. Ickes v. Underwood, et al., 78 App. D.C. 396, 141 F. (2d) 546 (1944); opinion of Acting Solicitor, 54 I.D. 294 (1933); Layman v. Ellis, 52 L.D. 714 (1929).

The question of whether clay can be appropriated under the Mining w has been before the Department on numerous occasions. Clays such as oin or china clay (Alldritt v. No. Pac. R.R. Co.) 25 L.D. 340), fire a, (Holman v. Utah, L.D. 314), colloidal clay, (Ortmann 52 L.D. 469), v all been declared to be subject to appropriation under the Mining Laws. a usable only for ordinary brick have been held to be not subject to c ion under the Mining Laws. (King v. Bradford , 31 L.D. 108). However, e latter decision has been criticized by text writers. Lindley on Mines, d dition, Section 424 states:

> "The manufactured product from a bed of brick clay, is more commonplace than the porcelain obtained from kaolin, or china clay, but we cannot understand why this should make any difference. The element of value in both cases rests upon the marketability of the manufactured product. Under the English decisions, brick clay is classified as a mineral under 'the railway clauses act,' and we can conceive of no logical reason why, in the administration of the Federal Mining Laws any discrimination should be made as between the finer and coarser grades of a substance, if it can be extracted, removed, and marketed at a profit."

In support of the first contention the contestant made reference to the Materials Disposal Acts of September 27, 1944 (58 Stat. 745) which authorizes the Secretary of the Interior to sell "sand, stone, gravel" and certain vegetative materials from public lands under the jurisdiction of the Department of the Interior, and of July 31, 1947 (61 Stat 681). The latter Act provides in part:

> "the Secretary of the Interior, under such rules and regulations as he may prescribe, may dispose of materials including but not limited to sand, stone, gravel, yucca, manzanita, mesquite, cactus, common clay, and timber or other forest products on public land of the United States if the disposal of such materials (1) is not otherwise expressly authorized by law, including the United States Mining Laws, (2) is not expressly prohibited by the laws of the United States, and (3) would not be detrimental to the public interest. * * * (Emphasis added)

Also, reference is made to the legislative history of the latter Act including a letter from the Secretary of the Interior providing that the Act would apply to:

> "4. Common earth to be used for road fills, earth dams, stock-watering reservoirs, and similar uses.
>
> 5. Clay to be used for the manufacturing of bricks, tile, pottery and similar products."

The contestant suggests that the legislative history of the latter Act together with the regulation promulgated to administer the Act disclose a belief on the part of Congress that the materials referred to in the Act were not covered by the Mining Laws and that the Act was to provide the sole means for their disposition. After a careful examination of the legislative history and regulations I find no such belief or intent. It is my opinion that the Materials Disposal Act was intended merely to authorize the Secretary of the Interior to dispose of materials which were not subject to appropriation under the Mining Laws. This would include any of the common materials which were not found under the circumstances necessary to meet the marketability requirement summarized in the decision in United States v. Strauss, (supra). Furthermore, it is my opinion that the determination of whether a particular substance can be appropriated under the Mining Laws must be based on the Mining Laws together with the various Judicial and Departmental interpretations of such laws.

Also, in support of contention No. 1 the contestant cited the decision in Anchorage Sand and Gravel Co. v. Schubert, 114 FS 436 (1952). In this decision the Court stated:

"to say that a discovery of gravel may be made in a large area of gravel open to view is to say that there can be a discovery of water in Cook Inlet or snow on Mt. McKinley. Such a perversion of the term did not only obliterate the safeguard referred to and result in the appropriation of large areas of the public domain to the detriment of the public, but it would also ignore the clause 'and the lands in which they are found' ".

After having found that there was an endless supply of the sand nd gravel in the particular area under consideration the Court held that nd and gravel was not subject to appropriation under the Mining Laws. he Court supported its view by referring to the Materials Disposal ct f 1947 and stated:

"since this Act bears a close analogy to the Mineral Lands Leasing Act it would appear to follow that sand and gravel like the minerals specified in the latter Act were not intended to be disposed of under the Mining Laws."

Low grade materials such as sand and gravel found under similar rcumstances have never been subject to location or appropriation pursuant the Mining Laws. It is interesting to note that on appeal the decision s affirmed on the grounds that the land in question had been appropriated r other purposes and was therefore no longer unappropriated public land bject to appropriation under the Mining Laws rather than on the grounds at sand and gravel were not minerals.

In support of the second contention the contestant referred to the ended Materials Disposal Act of July 23, 1955 (61 Stat. 681) which eliminates mmon varieties" of certain materials from the operation of the Mining Laws : "any mining claim hereafter located." This raises the question as to ether the effective date of the location for the Grape Vine Placer was ior to July 23, 1955.

The evidence on this subject was to the effect that the claim was ated some 50 years ago, that the shale was removed from the claim in 1906 d again from 1908 to 1910, that the claim was not used again until Mr. Tillotson, the present lessee, began experimenting with the substance in 1953, d that since the Fall of 1956 Mr. Tillotson has been using the shale as one the ingredients in the manufacture of ceramic sewer pipe. Having con- uded that the shale presently meets the test of marketability I must con- de that it could have met the test at any time over the period of the t decade. If the contest had been initiated prior to 1953, it would prob- y have been rather difficult to prove marketability by the contestee. wever, the burden of proving that the substance was not marketable would e been on the contestant so that whether the contestee could have effect- ly refuted evidence of non-marketability is pure speculation at this time. ust therefore conclude that the effective date of the location of the ape Vine Placer Claim was prior to July 23, 1955.

Also, the contestant refers to the 1955 Act as reasserting the authority of the Government to sell certain material and "made definite what had formerly been left to inference, that such material was not subject to the Mining Laws." Since the Act provides for "hereafter located" claims it is my opinion that the Act can not be extended to include locations made prior to the Act.

VI

From the foregoing it is my opinion that a shale deposit has been found on the Grape Vine Placer Claim under circumstances that meet the test of marketability, that because of the flux materials in the shale, the shale is usable for purposes other than for the purpose of making common brick and that the effective date of the location was prior to July 23, 1955. Therefore, I conclude that there has been a discovery of a valuable mineral and that the land in question is mineral in character. Accordingly, the Forest Service protest is dismissed.

VII

This decision is subject to the right of appeal to the Director of the Bureau of Land Management. An appeal must be received by the Hearing Examiner, Bureau of Land Management, Post Office Box 3861, Portland 8, Oregon, within 30 days from receipt hereof. Copies of notice of appeal and other documents must be served on the representative of the adverse party at the address appearing in Paragraph I of this decision. Full compliance is required with 43 CFR, Sections 221.1 to 221.5 inclusive, and to other pertinent sections of the Rules of Practice, Circular 1950, effective May 1, 1956, as amended by Circular 1962, effective October 4, 1956.

Graydon E. Holt

Graydon E. Holt
Hearing Examiner

Copies to:
Charles F. Lawrence
Office of the General Counsel
U.S. Dept. of Agriculture
216 Federal Office Bldg.
San Francisco 2, California

Alfred D. Freis
Attorney at Law
620 Story Bldg.
610 South Broadway
Los Angeles 14, California

Standard Distribution List

In reply refer to:
California Contest No. 6796
5.04g

December 22, 1958

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

Certified Mail
Return Receipt Requested

DECISION

nited States :
v. : Placer Mining Claim
ary A. Mattey :
:

Decision Affirmed

Contest proceedings were initiated by the United States Forest ervice in its protest against the patent application of Mary A. Mattey or the Grape Vine Placer Mining Claim situated within the Cleveland ational Forest. The protest charged that no discovery of mineral has een made on the claim and the land is nonmineral in character. After hearing in the contest the Hearing Examiner, by decision of May 7, 957, held the mining claim to be valid. The Forest Service, contestant-ppellant, has appealed from that decision.

The appellant contends that the contestee attempted to locate deposit of common clay or shale for which he has a present use and resent market in the manufacture of ceramic sewer tile, and that such aterial has never been locatable under the mining laws. It further ontends that there was no valid discovery prior to the effective date the act of July 23, 1955 (30 U.S.C. sec. 611), and since that date lay deposits of the type here involved have been disposable only under ie Materials Act of 1947, as amended (30 U.S.C. secs. 601-604). The ontestee, on the other hand, contends that the clay on the mining claim not of a common variety but is a valuable and locatable mineral under ie mining laws and that a sufficient discovery has been made within the undaries of the claim to warrant the issuance of patent, the clay ving been and being presently marketed at a profit.

The Grape Vine Placer was located some 50 years ago; it has en worked intermittently for the clay shale therein contained. The pe of shale presently mined is similar to that which is found common many areas and which is abundant in inaccessible reaches of Government nds. However, the shale on the contested claim was shown to be lculiarly valuable because of the chemical composition of the clay d the flux materials contained therein for the manufacture of ceramic wer tile. From 1953 to 1956 a manufacturer of ceramic sewer tile made

experimental tests of the shale on the Grape Vine claim and since the fall of 1956 has been using the shale from the claim in the manufacture of ceramic sewer pipe. The marketability of the shale appears to be established.

The mere fact that lands contain deposits of a common variety of, or ordinary, clay is not in itself sufficient to bring them within the class of mineral lands even though some slight use may be made commercially of such deposits. There may be, however, deposits of clay of such exceptional nature as to warrant the classification of the lands containing them as mineral lands. Holman et al., v. State of Utah, 41 L.D. 314 (1912). Common varieties, as defined by the Department and the courts include deposits which, although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits. 43 CFR 185.121(b).

The Examiner properly found, under the rule summarized in United States v. Strauss, 59 L.D. 129,138 (1945), that the clay within the Grape Vine claim, usable for purposes other than the making of common brick and peculiarly valuable because of its physical composition, including flux material, in the manufacture of sewer tile, was a discovery of a clay of a distinct and special economic value so as to constitute a discovery of a valuable mineral and that the land involved is mineral in character. Since the question concerning the effect of the Materials Act was interjected, he deemed it necessary to pass on whether a location of a "common varieties" material was made prior to July 23, 1955; he found the effective date of location to be prior to that date.

The record clearly establishes an existing special or distinct mineral value in the particular type clay found on the claim and that that clay has had a past, enjoys a present, and has a future prospective value; it has been and is presently marketed. See Layman et al., v. Ellis., 50 L.D. 714, (1929). It is not at present necessary to rule on whether "common varieties" of clay is included within the contemplation and purview of the act of July 23, 1955 as removed from the classification of valuable mineral, or whether it was omitted intentionally or otherwise from section 3 of the Act. It is merely necessary to note, even if clay were named as a mineral removed from the classification of valuable mineral, the deposits here concerned would, nevertheless, be excepted therefrom because " 'Common varieties' as used in sections 601,603, and 611-615 of this title does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value ***." 1/ Therefore, it matters not whether the effective date of location was prior or subsequent to July 23, 1955. The decision appealed from is modified accordingly and affirmed as modified.

The Manager, when this decision becomes final, is directed to take such steps for the further processing of the patent application as is appropriate in the premises.

1/ 30 U.S.C., sec. 611.

The Forest Service is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

In the event of an appeal the adverse party to be served is: Mary A. Mattey by her attorney, Alfred D. Freis, 610 So. Broadway, Los Angeles 14, California.

Director

Enclosure

DISTRIBUTION:

U. S. Department of Agriculture, Office of General Counsel
Att: Jesse R. Farr, Attorney in Charge (Certified Mail)
Alfred D. Freis, Attorney at Law (Regular Mail)
Mary A. Mattey (Regular Mail)
Minerals Staff Officer (5)
Mr. John Sieker, Forest Service, Department of Agriculture (8)
Hearings Administrative Officer
Appeals List No. 1
F

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